IN RE FIRST MALAYSIA FINANCE BHD. & IN RE THE CENTRAL BANK OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING PETITION NO. D3-26-13-89
30 NOVEMBER 1989

BANKING: *Capital restructuring exercise - Investigation by Bank Negara - FMF found to be insolvent - Risk assets in excess of permissible maximum ratio - Section 19 of Finance Companies Act 1969 - Bank Negara assumed control - Section 31(c) of the Central Bank of Malaysia Ordinance - Three shareholders object to restructuring exercise - Explanatory statement attached to amending bill - 'Unscrupulous dealings' - Whether explanatory statement can be relied upon to interpret provision in statute - Whether s. 31(c) is penal provision - Whether consolidation of fractional shares contrary to s. 31(c) - Application to stay - Merits.*

On 16 January 1989, Bank Negara assumed control of First Malaysia Finance Berhad. Following the assumption of control, Bank Negara petitioned the Court under s. 31(c) of the Central Bank of Malaysia Ordinance 1958, for a capital restructuring exercise.

Neither FMF nor its creditors objected to the restructuring exercise but 3 of its registered shareholders opposed the petition strenuously. The objections raised by these opposing shareholders were:

(1) whether s. 31c under which this petition is presented, is applicable;

(2) there is no true and updated financial position of FMF;

(3) whether the amended prayer 2 of the petition falls outside the scope of s. 31c.

Further, it was the contention of at least two of the opposing shareholders that s. 31c was not applicable to them as:

(1) they have not been guilty of any unscrupulous dealings; and

(2) that section was intended to be retrospective.

Held:

[1] An explanatory statement in a bill can never be relied upon to interpret a provision in a statute as its presence in the bill is merely to state the purposes and intentions as to why the bill, which in this case contains the proposed amendment, has been presented to Parliament.

[2] All that Bank Negara needs to establish to invoke s. 31(c) of the Central Bank Ordinance 1958 is that FMF is an insolvent company as its capital has been lost or unrepresented by available assets.

[3] Section 31c is not penal in nature as it merely empowers the Court to reduce the share capital of a financial institution and to cancel its shares in instances where the capital of such a financial institution is lost or unrepresented by available assets.

[4] No new disability had been disclosed todate to warrant the opposing shareholders questioning the retrospective or prospective effect of s. 31(c).

[5] Bank Negara must have considered the securities held by FMF when arriving at the total losses suffered by FMF, it therefore cannot be considered that the argument on revaluation could carry any weight whatsoever.

[6] A consolidation of fractional shares is part and parcel of the scheme for the cancellation of shares and the Court is empowered to order such a consolidation under s. 31(c) of the Central Bank Ordinance 1958.

[7] The opposing shareholders application for stay is dismissed as it would defeat the very purpose of the order granted by the Court.

[Order accordingly.]

Legislation referred to:
Central Bank of Malaysia Ordinance 1958, s. 31c
Finance Companies Act 1969, ss. 8, 19, 33

For Dato Dr. Chen Lip Keong and First Holdings Sdn. Bhd., opposing shareholders - R.R. Sethu; M/s. R.R. Sethu
For Datuk Husain bin Mohamed, an opposing shareholders - M.S. Murthi; M/s. Murthi & Partners
For the petitioner - C. Das (John Mathew with him); M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Yaakob J:

On 16 January 1989, Bank Negara assumed the control of the financing business of First Malaysia Finance Berhad (FMF) under s. 33 (iii) of the Finance Companies Act 1969, (the Act), following investigations conducted by the bank as to the financial standing of FMF. The investigations reveal that FMF is hopelessly insolvent and no longer a viable concern as its paid up capital, unimpaired by losses fell well below the statutory minimum requirement of RM1 million as prescribed under s. 8 of the Act and that it holds risk assets in excess of the permissible maximum ratio of 15 times its shareholders funds in contravention of s. 19 of the Act.

Following the assumption of control, Bank Negara petitioned the Court under s. 31c of the Central Bank of Malaysia Ordinance 1958, for a capital restructuring exercise which involves:

(1) a reduction of FMF's existing capital to 1 sen per RM1 share, thereby reducing the present paid up capital of RM20,274 million to RM202,740, thus effecting a cancellation of the present paid up capital and

(2) a call on the existing shareholders to pay a sum of 99 sen per share held by them so as to restore the par value of the shares to RM1 each.

This rescue scheme is to reflect FMF's true financial position and the injection of new capital would enable FMF to comply with ss. 8 and 19 of the Act for in event the shareholders do not top up the eroded portion of the share capital and that no new shareholders will take up the shares, Bank Negara would do so. Neither FMF nor its creditors object to the restructuring exercise but 3 of its registered shareholders (the opposing shareholders) namely:

(1) First Holding Sdn. Bhd., with a holding of 21.1%.

(2) Datuk Dr. Chen Lip Keong, with a holding of 17.3% and

(3) Datuk Husain bin Mohamed, with a holding of 1%

oppose the petition strenuously. Apart from his personal holdings, Datuk Dr. Chen is also the beneficial owner of the shares held by 2 nominees, Kemajuan Tenaga Sdn. Bhd., and Dato Abdul Rahman bin Hamzah who between them hold 46.8% of the total shares in FMF as trustees, thereby making Datuk Dr. Chen a majority shareholder in FMF.

The objections raised by these opposing shareholders are:

(1) whether s. 31c under which this petition is presented, is applicable.

(2) there is no true and updated financial position of FMF and

(3) whether the amended prayer 2 of the petition falls outside the scope of s. 31c.

It is the contention of at least two of the opposing shareholders that s. 31c is not applicable to them as:

(1) they have not been guilty of any unscrupulous dealings and

(2) that section was intended to be retrospective.

The opposing shareholders rely on the explanatory statement attached to the bill that seeks to amend the Central Bank of Malaysia Ordinance 1958, with *inter alia*, the inclusion of a new s. 31c. The statement sets out that the purpose of the new s. 31c is to prevent unscrupulous shareholders from retaining and benefitting from their equity stake after the bank or finance company has been rescued by Bank Negara. Since s. 31c speaks of unscrupulous shareholders, it was contended that there must be proof of unscrupulous dealings before s. 31c can be applicable.

My answer to this contention is that firstly an explanatory statement in a bill can never be relied upon to interpret a provision in a statute as its presence in the bill is merely to state the purposes and intentions why the bill which in this case contains the proposed amendment has been presented to Parliament. By the time the proposed amendment becomes law, the intentions and purposes would have been debated at great length in Parliament and the end result is the Act containing the amendment on which I have now been asked to interpret. All that s. 31c empowers is to enable the Court to reduce the share capital of a financial institution by cancelling any portion of its paid up capital which is lost or unrepresented by available assets. To that end, all that Bank Negara need to establish to invoke s. 31c is that FMF is an insolvent company as its capital has been lost or unrepresented by available assets.

Reviews conducted by Bank Negara on the audited accounts of FMF for the years 1986 and 1987 show that FMF suffered losses since 1982 and such losses have accumulated to RM114.108 million as at 31 December 1987. The present net worth of its shares is negative and as such its capital is no longer represented by assets. It is operating in contravention of the risk assets ratio requirement and the minimum requirement of RM1 million, unimpaired by losses as prescribed under ss. 19 and 8 of the Act.

Whilst not denying or disputing that the capital of FMF is in fact lost or unrepresented by available assets, the two opposing shareholders particularly Datuk Dr. Chen, who is also the executive chairman of FMF, attempted to show that they were not to be blamed for such losses, the bulk of which relate to non-performing loans. They contend that such loans were incurred by the previous management from whom the 2 opposing shareholders and the nominees of Datuk Dr. Chen had purchased FMF's controlling shares of 11,979,333 pursuant to a sale and purchase agreement dated 28 December 1984. They contend further that as at

the date of the purchase, they were not aware of the presence of such loans or their status. This cannot be right as the agreement has annexed to it a list of old and new loans and their outstanding balance as at 30 November 1984.

It is true that Bank Negara was aware of the purchase as it had sanctioned it on the understanding, *inter alia*, that the new shareholders inject funds of at least RM25 million to comply with ss. 8 and 19 of the Act.

It was also expected that at least RM53 million would be realised from the purchase of the shares and this would form the additional capital required to make FMF a viable concern. Unfortunately, only RM31 million was realised as the difference had been utilised to set off the loans incurred by the old management and out of the RM25 million which Bank Negara had stipulated to be injected into FMF, the new management only succeeded in bringing in RM8.3 million. These amounts were still not sufficient to sustain FMF's operations. As a result Bank Negara imposed lending limits. FMF was only allowed to trade subject to a single customer lending limit of RM500,000. Thus to state that FMF's operations were suspended altogether cannot be correct. A further effort to increase FMF's capital by way of a rights issue was thwarted by a minority shareholder, Ganda Holdings Sdn. Bhd., who obtained an injunction against FMF proceeding with its proposal to declare a rights issue. Burdened with these problems, Bank Negara was forced to inject RM125 million into FMF to keep it as a going concern.

It is the opposing shareholders' contention that as they had done everything in their power to rescue FMF, their conduct can never be equated to that of an unscrupulous shareholder and to that extent, s. 31c is not applicable to them.

Whilst it is true that the opposing shareholders had come with a number of proposals to rescue FMF, the fact still remains that their efforts came to nothing as FMF continued to be riddled with debts. It cannot be denied that the active participation of particularly Dato Dr. Chen in the affairs of FMF is nothing more than a business venture for which expectations of profits must have been the one and only deciding factor which prompted him to purchase the controlling shares in FMF in the first place. Thus when he became the executive chairman of FMF, he had not only to contend with bad debts but also the lending limits, which imposition Bank Negara was willing to relax if more funds were injected into FMF.

I consider that s. 31c is not penal in nature but that it merely empowers the Court to reduce the share capital of a financial institution and to cancel its shares in instances where the capital of such a financial institution is lost or unrepresented by available assets. Thus to interpret s. 31c as containing anything more than this is to put into that section words that are not there.

It has also been suggested that s. 31c is not intended to be retrospective as it is expressed in the present tense. Since it creates a new disability which is penal in nature in respect of past events being the losses already suffered by FMF since 1982, the section can only be interpreted to be prospective.

As I have stated earlier, s. 31c is not penal in nature and it is true that the events leading to FMF's present insolvency happened since 1982 and from that time until the present FMF has been in a continuous state of financial chaos. The present financial position of FMF that is now being considered is no more different to that in 1982 (apart from the fact that FMF's indebtedness have been accumulated) and as such no new disability has been disclosed to-day to warrant the opposing shareholders questioning the retrospective or prospective effect of s. 31c.

Objection was also taken that there is no proper and updated valuation of the losses suffered by FMF for the years 1986 and 1987 to distinguish the good loans from the bad ones. The argument put forward is that since some of the securities for the loans are landed properties, a present valuation of such properties should have been done, so that a true picture can be seen of the actual losses suffered for the two years.

In its amended petition, Bank Negara has already set out in great detail the position of FMF's bad debts as at the end of 1986 and 1987 and has concluded that the accumulated losses suffered since 1982 amounted to RM114.108 million. It is true that there is no disclosure of any valuation done of the securities held by FMF for the debts incurred in 1986 and 1987 and apart from insisting that such securities be revalued, no other evidence is available as to what extent such revaluation can make any difference to the amount Bank Negara has placed as the accumulated loss. In carrying out its functions under the Central Bank of Malaysia Ordinance 1958 and enforcing the Act, I am sure that Bank Negara must have considered the securities held by FMF when arriving at the total losses suffered by FMF. For these reasons, I do not consider that the argument on revaluation can carry any weight whatsoever.

Lastly I come to the objection on that part of the amended prayer 2 of the petition that speaks of the consolidation of fractional shares as being contrary to s. 31c.

It is true that s. 31c does not make any provision for the consolidation of fractional shares but I consider that such a consolidation is part and parcel of the scheme for the cancellation of shares that I am empowered to order under that section. Parliament is not concerned with the methods used to effect the cancellation of the capital of any financial institution but has left it to the wisdom of Bank Negara as the Central Bank of this country with supervisory powers over all financial institutions, to find the most beneficial solution with regard to the cancellation of capital provided of course it does not work to the detriment of any shareholder holding fractional shares. Under the amendment to prayer 2 of the petition, fractional shares, following the consolidation, will not be cancelled, but instead will be treated as 1 share at RM1 and will be credited as fully paid.

Since all the objections carried no weight, I had allowed Bank Negara's amended petition in terms of prayers 1-3 with costs to be borne by the opposing shareholders and to be paid to the petitioner.

The opposing shareholders had also applied for a stay pending their appeal to the Supreme Court. Since no special circumstances were shown why I should exercise my discretion but on the contrary, such a stay would defeat the very purpose of the order I had just made, I had also dismissed the opposing shareholders' oral application for stay but granted them leave to appeal to the Supreme Court.

Also found at [1990] 1 CLJ 778